

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

UNITED STATES OF AMERICA, ) NO. C70-9213RSM  
et al., ) (SP09-01)  
 )  
Plaintiffs, ) SEATTLE, WASHINGTON  
v. ) 5/22/2013  
 )  
STATE OF WASHINGTON, et ) ORAL ARGUMENT  
al., )  
Defendants. )

VERBATIM REPORT OF PROCEEDINGS  
BEFORE THE HONORABLE RICARDO S. MARTINEZ  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

Makah Tribe: MARC SLONIM  
BRIAN C. GRUBER  
Ziontz Chestnut Varnell Berley &  
Slonim

Quinault Indian Nation: ERIC J. NIELSEN  
Nielsen Broman & Koch

Quileute Tribe: LAUREN KING  
Foster Pepper PLLC  
and  
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S'Klallam Tribes: LAUREN P. RASMUSSEN  
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Hoh Tribe: CRAIG J. DORSAY  
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1       **APPEARANCES: (Con't)**

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9               **Puyallup Tribe:**           **SAMUEL J. STILTNER**  
10   **Puyallup Tribe of Indians**

## PROCEEDINGS

THE COURT: Good morning to all. You may be seated.  
Thank you.

THE CLERK: This is the oral argument hearing on the  
Makah Indian Tribe's motion for partial summary judgment in  
Cause No. C70-9213, Subproceeding 09-01, United States, et  
al. versus the State of Washington, et al.

Would counsel please rise and make their appearances for  
the record.

MR. SLONIM: Good morning, Your Honor. Marc Slonim  
for the Makah Tribe, along with Brian Gruber.

THE COURT: Gentlemen, thank you.

MR. NIELSEN: Good morning, Your Honor. Eric Nielsen  
on behalf of the Quinault Indian Nation.

THE COURT: Mr. Nielsen.

MS. KING: Good morning, Your Honor. Lauren King for  
the Quileute Tribe.

THE COURT: Ms. King.

MR. DORSAY: Good morning, Your Honor. Craig Dorsay  
for the Hoh Tribe.

THE COURT: Mr. Dorsay.

MR. RAAS: Good morning, Your Honor. Daniel Raas for  
the Lummi Nation.

THE COURT: Mr. Raas, thank you.

1 MR. RAAS: Lummi does not take a position, but with  
2 the court's indulgence, I just want to use counsel table to  
3 write on.

4 THE COURT: No problems for us. Thank you very much.  
5 And we have other counsel present as well from some of the  
6 other tribes. If I could have you introduce yourself for our  
7 record as well.

8 MR. MORISSET: May it please the court. Mason  
9 Morisset for Tulalip. And I think I am with my brother Dan  
10 Raas as to the issues, but he got a better chair than I did.

11 MS. RASMUSSEN: Good morning. My name is Lauren  
12 Rasmussen for the Port Gamble S'Klallam and Jamestown  
13 S'Klallam Tribes. We won't be arguing, but we did take a  
14 position, actually needed to. On 7/15/2010 we filed a  
15 response to the motion to dismiss. And our position is  
16 exactly the same today as it was in that response.

17 THE COURT: Thank you, Ms. Rasmussen.

18 MR. LEES: My name is Earle Lees. I'm the attorney  
19 for the Skokomish Indian Tribe. And I won't be making an  
20 argument today.

21 THE COURT: Good morning.

22 MR. TONDINI: Good morning, Your Honor. John  
23 Tondini. I'm co-counsel with Ms. King, but she will be doing  
24 the argument today.

25 THE COURT: Thank you.

1 MR. REICH: Richard Reich for the Muckleshoot Tribe.

2 THE COURT: Good morning.

3 MR. STILTNER: Good morning, Your Honor. Sam  
4 Stiltner for the Puyallup Tribe.

5 THE COURT: I don't see anybody else. All right.  
6 Thank you.

7 All right. Counsel, let me tell you, I have reviewed all  
8 of the material submitted for this motion for partial summary  
9 judgment being brought by the Makah. And why don't we break  
10 it up. Since the Quinault and the Quileute both submitted  
11 substantial responses, let's break it up this way --  
12 Mr. Slonim, are you going to be arguing?

13 MR. SLONIM: Yes, Your Honor.

14 THE COURT: All right. Why don't we have you take up  
15 the 20 minutes. And you might have a few minutes left for  
16 rebuttal. And then we will have the same with the Quinault  
17 and the Quileute. You will each get up to 20 minutes each.

18 All right. Are you ready, Mr. Slonim?

19 MR. SLONIM: I am, Your Honor. Your Honor, Makah's  
20 motion for partial summary judgment presents three issues.  
21 First, does Makah have standing to seek a determination of  
22 the location of Quileute and Quinault ocean fishing places?

23 The court previously found that the allegations in Makah's  
24 Request for Determination were sufficient to demonstrate that  
25 Makah has standing. Makah has now submitted evidence to

1 support its allegations and seeks summary judgment that it  
2 has standing on the basis of that evidence.

3 THE COURT: Didn't we already rule that you had  
4 standing?

5 MR. SLONIM: Well, you ruled on the basis of the  
6 allegations in our Request for Determination. And so at this  
7 stage -- and then subsequent to that, Quileute and Quinault,  
8 in a status conference, informed us that they intended to  
9 continue challenging our standing on the grounds that we  
10 wouldn't be able to prove what we alleged. And so we have  
11 now submitted the evidence to support our allegations and are  
12 seeking summary judgment that the evidence, the undisputed  
13 evidence, establishes our standing.

14 The second issue is the issue the court asked us to  
15 address in its prior court orders, which involves the  
16 interpretation of Judge Boldt's findings under  
17 Paragraph 25(a)(1), and, in particular, whether Judge Boldt  
18 specifically determined the location of Quileute and Quinault  
19 ocean fishing places and whether he included in those  
20 findings any waters more than three miles offshore.

21 Here, it is important to note that Makah, Quileute, and  
22 Quinault all agree that Judge Boldt's findings did not  
23 include waters more than three miles offshore. The only  
24 dispute we have is regarding waters within three miles of  
25 shore.

1 As to those waters, it is Makah's position that, with the  
2 exception of certain beaches and river mouths, Judge Boldt  
3 did not specifically determine the location of Quileute and  
4 Quinault ocean fishing places, but instead left that  
5 determination to a future proceeding under what was then  
6 Paragraph 25(f) and is now Paragraph 25(a)(6) of the court's  
7 permanent injunction.

8 And then the final issue is, what happens next? If the  
9 court agrees with the parties that Judge Boldt's findings did  
10 not include waters more than three miles offshore, we believe  
11 it should retain jurisdiction to determine the western extent  
12 of Quileute and Quinault's ocean fishing places under  
13 Paragraph 25(a)(6).

14 Similarly, if the court finds that Judge Boldt did not  
15 establish a northern boundary for Quinault's -- or for  
16 Quileute's ocean fishing places, we believe it should retain  
17 jurisdiction to make that determination under  
18 Paragraph 25(a)(6) as well.

19 I would like to just touch initially on the standing  
20 issue, recognizing that you have already made a  
21 determination, but the issue has been contested based on the  
22 evidence we have submitted.

23 There are four undisputed facts that underlie our  
24 position: First, that at the time the Makah filed this  
25 Request for Determination, Quileute and Quinault had

1 announced their intent to enter the treaty Pacific whiting  
2 fishery and were active participants in the treaty blackcod  
3 and halibut fisheries.

4 Second, all of those fisheries take place more than five  
5 to ten miles offshore. And the Quileute blackcod and halibut  
6 fisheries take place within Makah's adjudicated usual and  
7 accustomed grounds.

8 THE COURT: Mr. Slonim, am I correct that both the  
9 Quileute and Quinault have not entered the whiting fishing?

10 MR. SLONIM: They have not participated to date in  
11 the fishery. Quileute has requested and received an  
12 allocation from the National Marine Fisheries Service. But  
13 so far they have not participated.

14 THE COURT: Does that affect your issue of standing?  
15 So long as they don't, is there any harm being done to the  
16 Makah?

17 MR. SLONIM: Yes, there is. Well, there is with  
18 respect to the other fisheries. As to the whiting fishery,  
19 the standing determination is made as of the date we filed  
20 the Request for Determination, which was in 2009.

21 As of that date, they had both announced their intent to  
22 enter the fishery. We had already engaged in co-management  
23 discussions with them throughout 2008 and much of 2009 in an  
24 unsuccessful attempt to negotiate an intertribal plan.

25 Quileute was planning to enter the fishery that year.

1 They had projections of, initially, one boat and three to  
2 four boats, with harvest projections up to 24,000 metric  
3 tons, which is almost as much as what Makah was taking at the  
4 time. So we had an actual and imminent entry into the  
5 fishery, which causes injury to us. And we think that's  
6 sufficient for standing purposes.

7 The reasons -- we don't know why they haven't entered the  
8 fishery since then. They both told us they were planning on  
9 entering. They told the National Marine Fisheries Service.  
10 People were engaged, not only us, but the federal government,  
11 in accommodating their entry into the fishery. And we have  
12 yet to receive any explanation of why that hasn't happened.

13 With respect to the blackcod and the halibut fisheries,  
14 they were already participating, and have continued to  
15 participate in those fisheries. And those fisheries take  
16 place well beyond ten miles offshore.

17 THE COURT: But with respect to those two species,  
18 you do have a management plan and an agreement with them,  
19 right?

20 MR. SLONIM: Yes. And so we engage in -- we devote  
21 significant efforts to negotiating those management plans and  
22 agreements. And as a result of those management plans and  
23 agreements, less fish is available to the Makah than would be  
24 if they weren't participating in the fishery.

25 It's a single stock of fish that we're fishing on. There

1 is a single overall quota. So what another tribe takes, we  
2 don't take. It's not available to us. So there is a direct  
3 impact on Makah from their participation in each of those  
4 fisheries.

5 And then the final element with respect to the whiting  
6 fishery is that, as a result of their announced intent to  
7 enter into the fishery, the National Marine Fisheries Service  
8 said, well, we now need to determine an overall treaty share  
9 for this fishery.

10 That issue had been resolved, as long as Makah was the  
11 only participant in the fishery. We spent, you know, many,  
12 many years actually working on that, litigating that issue,  
13 and had it resolved.

14 And then, with the intent of Quileute and Quinault to  
15 enter the fishery, a new process was started, and Makah was  
16 required to engage in that process. We hired consultants.  
17 We again devoted significant time and resources to dealing  
18 with an issue that arose directly because of their announced  
19 intent to participate in the fishery.

20 And for all of those reasons, we think there is clear  
21 evidence of injury here, actual injury in the blackcod and  
22 halibut fisheries, and imminent injury in the whiting  
23 fishery, which is sufficient to support Makah's standing.

24 And it's the evidence that we -- what we have alleged in  
25 the Request for Determination that the court found sufficient

1 is now supported by evidence, and we think it's sufficient to  
2 grant summary judgment on that issue.

3 And unless the court has more questions about that, I'm  
4 going to move on to the interpretation of Judge Boldt's  
5 findings, and in particular to the meaning of the term  
6 "adjacent" as used in those findings, which is the term that  
7 the court focused on in its prior orders.

8 As I mentioned at the outset, Quileute, Quinault, and  
9 Makah all agree that the findings did not include any ocean  
10 waters more than three miles offshore. Makah reaches that  
11 conclusion and the further conclusion that Judge Boldt did  
12 not intend to specifically determine the location of  
13 Quileute's and Quinault's ocean fishing places, even within  
14 three miles of shore, based on several considerations.

15 First, the ordinary meaning of the term "adjacent" does  
16 not connote a specific distance. It simply means nearby or  
17 not far. The context in which the term is used may provide  
18 some indication of the distance involved, or it may confirm  
19 that no specific distance was intended.

20 Here, the overall context was provided by Judge Boldt's  
21 limitation of the case area as areas within the jurisdiction  
22 of the state of Washington which extended only three miles  
23 offshore.

24 Although the case area has since been expanded, in light  
25 of the limitation on the case area in 1974, it's reasonable

1 to infer that Judge Boldt's findings did not address or  
2 include waters more than three miles offshore.

3 Notably, in one instance, Judge Boldt did make a finding  
4 about tribal fisheries outside of the case area. In Finding  
5 No. 121, which is at 384 F.Supp, pages 374 and 375, Judge  
6 Boldt found that Quinault had, quote, important fisheries  
7 which were shared with other tribes to the south and east of  
8 the boundaries of the case area, especially Grays Harbor and  
9 those streams which empty into Grays Harbor, closed quote.

10 In that instance, Judge Boldt stated expressly that he was  
11 referring to an area beyond the case area boundaries.

12 However, there is nothing in his findings regarding  
13 Quileute's ocean fishing places or Quinault's ocean fishing  
14 places to suggest he was intending to make a finding  
15 regarding fishing in areas that were outside the case area.

16 The evidence in the record before Judge Boldt also  
17 provides important context for his findings. And there was  
18 no evidence before him to support a finding that either  
19 Quileute or Quinault had usual and accustomed fishing grounds  
20 more than three miles offshore.

21 We attached to our motion and discussed in some detail all  
22 of the evidence cited by Judge Boldt in his findings, as well  
23 as other evidence that we were able to locate in the trial  
24 record before Judge Boldt bearing on Quileute's and  
25 Quinault's ocean fishing places.

1 As to Quileute, Dr. Lane found that they, quote, relied  
2 primarily on salmon and steelhead taken in their long and  
3 extensive river systems, closed quote.

4 To be sure, there was evidence of at least some ocean  
5 fishing, including evidence about the species taken, certain  
6 beaches and river mouths where Quileute harvested smelt and  
7 cod, and some coastal sites that were used for sea fishing  
8 and bottom fishing. However, there was no evidence of how  
9 far offshore Quileute went in pursuing these fisheries,  
10 whether one, two, three, or more miles offshore.

11 The specific coastal sites were identified in an exhibit  
12 from an Indian Claims Commission case which Dr. Lane attached  
13 to her report on Quinault's fishery. And this is attached to  
14 our motion for summary judgment. And this is the exhibit  
15 from the Indian Claims Commission case.

16 And it's a little hard to see here. But when you look at  
17 the hard copy, you will see that these numbered sites are  
18 sites that were identified as either village sites or fishing  
19 sites where Quileute, Hoh, Queets, and Quinault had engaged  
20 in fisheries.

21 And there are some sites you can see. Lake Ozette is  
22 shown on the upper left here. And there are sites to the  
23 south of Lake Ozette, along the coast. But there was no  
24 evidence about where Quileute went from those sites to fish,  
25 whether they fished on the beach, whether they fished a mile

1 offshore or two miles offshore. There was no evidence about  
2 how far they went. And that was the best evidence we had to  
3 support the fact that they were fishing in the ocean.

4 Similarly, as to Quinault, there was actually even less  
5 evidence of ocean fishing for Quinault. You will see there  
6 are many fewer ocean sites in the Quinault area than in the  
7 Quileute area. But, again, neither the map nor the table  
8 that accompanies this map that describes some of these sites  
9 provide any evidence of how far offshore they were going from  
10 these sites to fish.

11 There was one discussion of offshore distance with respect  
12 to Quinault which was in an excerpt from a manuscript by  
13 Dr. Ronald Olson. Dr. Lane attached Olson's manuscript to  
14 her report, or excerpts of it, not because of its discussion  
15 of their offshore fishing locations, but because it had a  
16 very detailed description of the fishing gear they used in  
17 the river system, of traps and other in-river fishing gear.  
18 But in that excerpt, Olson stated that certain fish could  
19 have been taken by Quinault anywhere along the coast within  
20 six miles of shore.

21 It's important to note, however, that Judge Boldt did not  
22 cite that excerpt in support of his finding regarding  
23 Quinault fishing places. And the statement that fish could  
24 have been taken within six miles of shore does not establish  
25 that they were taken there on a usual and accustomed basis.

1 In sum, based on Judge Boldt's use of the nonspecific term  
2 "adjacent," the case area limitation in 1974, when Judge  
3 Boldt made his findings, and the absence of any evidence in  
4 the record regarding the distances offshore at which Quileute  
5 and Quinault fish, we think the most reasonable construction  
6 of Judge Boldt's findings regarding Quileute and Quinault  
7 ocean fishing places is that he did not intend to make a  
8 specific determination of their location and that he did not  
9 intend to include any waters more than three miles offshore.

10 There is nothing particularly surprising about that  
11 conclusion. Judge Boldt acknowledged that he was not  
12 specifically determining the usual and accustomed fishing  
13 grounds for all tribes and established in what is now  
14 Paragraph 25(a)(6) the mechanism for making such  
15 determinations in the future. And we think this is a  
16 situation where this is precisely what 25(a)(6) was intended  
17 to cover, where there isn't an existing determination of the  
18 specific locations of these fishing grounds.

19 Now, although Quileute and Quinault agree that Judge  
20 Boldt's findings did not include any water more than three  
21 miles offshore, they do contend that he intended to include  
22 all waters out to three miles. There are several problems  
23 with their arguments.

24 First, both Quileute and Quinault have discerned the  
25 meaning of the term "adjacent" from Judge Boldt's use of that

1 term in another passage in his decision which involved  
2 contemporary nontreaty fisheries that were, quote, closely  
3 adjacent to but beyond the territorial waters of the state,  
4 closed quote. The problem is that the very different context  
5 for that passage doesn't really shed much light on how Judge  
6 Boldt used the term "adjacent" in a different passage in a  
7 very different context.

8 Second, for its part, in its brief, in its responsive  
9 brief, Quileute did not discuss any of the evidence before  
10 Judge Boldt. Instead, it presented to you a variety of  
11 materials that were not in the record before Judge Boldt,  
12 court cases that were not cited by Judge Boldt, reports that  
13 were prepared after 1974, and other materials, testimony that  
14 was given later than 1974.

15 Those kinds of materials are not properly submitted in a  
16 Paragraph 25(a)(1) proceeding, which is what this is at this  
17 point, and shed no light on what Judge Boldt intended. There  
18 is nothing in Quileute's response that points to any evidence  
19 in the record before Judge Boldt about the location or how  
20 far offshore their fishing grounds went.

21 Quinault does discuss some of the evidence before Judge  
22 Boldt. But it also points to materials that were not in the  
23 record before Judge Boldt, a 1977 report by Dr. Lane, which  
24 came three years after Judge Boldt's findings and was not  
25 submitted to him, and portions of the Olson manuscript that

1 were not provided to Judge Boldt in 1974.

2 The evidence that was before Judge Boldt, such as  
3 Quinault's acquisition of canoes from Makah in its travel to  
4 the Columbia River to trade, simply does not indicate how far  
5 offshore Quinault fished at treaty time. Indeed, as this  
6 court has pointed out on several occasions, fishing incident  
7 to travel is not evidence of usual and accustomed fishing  
8 grounds at all.

9 Quileute and Quinault also discussed evidence of whaling  
10 and sealing. As we pointed out in the Makah -- there was a  
11 proceeding in this case involving Makah's ocean fishing  
12 places. And both this court and the Ninth Circuit held that  
13 evidence of whaling and sealing could not be used to  
14 establish usual and accustomed fishing grounds. And we  
15 believe strongly that the same rules for determining usual  
16 and accustomed grounds should apply to all tribes.

17 But the additional problem here is that, as was the case  
18 for fishing, there was no evidence before Judge Boldt  
19 regarding how far offshore Quileute or Quinault went in  
20 pursuit of whales and seals.

21 In sum, in the absence of any evidence in the record  
22 before Judge Boldt regarding how far offshore Quileute and  
23 Quinault fish on a usual and accustomed basis at treaty  
24 times, it cannot be said that he made a specific  
25 determination of the location of their offshore fishing

1 grounds even within three miles of shore.

2 Now I want to take just a minute to talk about this  
3 exhibit, which nobody cited in the briefing. We didn't  
4 address it in the briefing. This was an illustrative exhibit  
5 prepared by attorneys for the United States during the course  
6 of the trial before Judge Boldt. It was brought into court  
7 and shown to Dr. Lane while she was testifying. And she  
8 initially said, "I can't really comment on it, because I've  
9 never seen it before."

10 And then she was given an opportunity to look at it. And  
11 she came back, and she was asked about certain river  
12 stretches, where she said, "Well, that's not accurate.  
13 That's not what my report said. And if you want to know what  
14 my opinion is, you have to look at my reports. That's where  
15 I provided my opinion."

16 That exhibit was admitted on the basis of that testimony  
17 for illustrative purposes only and never cited by Judge  
18 Boldt. And so to rely on it now, to assume that there was  
19 evidence that there were usual and accustomed grounds in all  
20 of those red areas, even when there was actually no evidence  
21 in Dr. Lane's reports or anywhere else in the record to  
22 support that, is really a misuse of that exhibit.

23 For that --

24 THE COURT: Counsel, I know you want to save a little  
25 bit of time for rebuttal. I have a couple of questions.

1 MR. SLONIM: Okay.

2 THE COURT: In reading the responses of your  
3 opponents here, one of the issues that they bring up is  
4 subject matter jurisdiction. I think everyone agrees that  
5 Judge Boldt did not include -- his ruling did not include  
6 waters more than three miles offshore. And, yes, I think  
7 there is a dispute as to what "adjacent" means and what he  
8 meant by it and within the three-mile range.

9 But aside from what the original case area was, what is  
10 the case area now?

11 MR. SLONIM: There were two limitations in the  
12 conclusion of law that put two limitations on the original  
13 decision. One was geographic. It was limited to waters  
14 within the state. And one was a species limitation. It was  
15 limited to anadromous fish. And those limitations have both  
16 been dropped by the court.

17 The anadromous species limitation was dropped in a  
18 proceeding involving herring, where the court said: As long  
19 as the dispute arises under the treaties, it's within my  
20 subject matter jurisdiction, and I can consider it. It makes  
21 no sense to start a new case and then have to consolidate it  
22 with this case.

23 The geographic limitation was dropped in a series of  
24 cases. First, when Makah sought an adjudication of its usual  
25 and accustomed grounds in the ocean, the court held that that

1 adjudication was within its subject matter jurisdiction.  
2 Makah was seeking an adjudication out to 100 miles. The  
3 ruling was that its usual and accustomed grounds went to 40  
4 miles. And both this court and the Ninth Circuit said that  
5 issue was within the court's subject matter jurisdiction and  
6 part of this case.

7 We've had enumerable proceedings involving the halibut  
8 fishery, which takes place well beyond the three-mile limit.  
9 The bulk of the coastal halibut fishery takes place from 12  
10 to 20 miles offshore.

11 We had a subproceeding in this case involving the whiting  
12 fishery, which takes place from 12 to 40 miles offshore.  
13 That was held to be within the subject matter jurisdiction of  
14 this court.

15 We had proceedings in this case initiated not only by  
16 Makah but by Quinault and Hoh regarding the blackcod fishery  
17 in which Quileute was an adverse party. That fishery takes  
18 place well beyond the three-mile limit. That was held to be  
19 within the subject matter jurisdiction of the court.

20 In the shellfish case, which in part involved species  
21 outside three miles, the court said that the subject matter  
22 jurisdiction of this court is issues arising under the  
23 Stevens Treaties. And I think there is no geographic  
24 limitation anymore as long as the issue arises under the  
25 Stevens Treaties. And nothing is more central to the Stevens

1 Treaties than the determination of usual and accustomed  
2 fishing areas.

3 Our request that the court retain jurisdiction under  
4 Paragraph 25(a)(6) and make a determination of Quileute and  
5 Quinault's ocean fishing areas, we think, lies really at the  
6 heart of this case. And the claim that Quileute and Quinault  
7 are making, that they have some type of special immunity so  
8 that they can continue to fish in an area where they  
9 acknowledge there's never been a determination that they have  
10 a treaty right in the first place, makes them the outliers.  
11 Every other tribe has had to adjudicate its usual and  
12 accustomed fishing grounds, in some cases in multiple  
13 proceedings.

14 And to provide an immunity for two tribes to say, we can  
15 fish in existing fisheries, we can expand into new fisheries,  
16 but you can't decide whether we have a treaty right there in  
17 the first place is -- that's the outlier. And that is not  
18 only injurious to Makah, but it's a threat to the integrity  
19 of the treaty fishing right and integrity to this entire  
20 case.

21 THE COURT: Mr. Slonim, thank you. I will give you  
22 two minutes for rebuttal.

23 Mr. Nielsen, on behalf of the Quinault.

24 MR. NIELSEN: Thank you, Your Honor. May it please  
25 the court. Eric Nielsen on behalf of Quinault Indian Nation.

1 I guess, first off, I would like to say that if you look  
2 at the Makah's motion for partial summary judgment, they  
3 raise actually two issues. They are now arguing that they  
4 have raised three. But the issues they do raise are whether  
5 they have standing to seek adjudication of the location of  
6 the Quinault and Quileute Pacific Ocean U&A and whether Final  
7 Decision 1 did not specifically determine the Quinault and  
8 Quileute Pacific Ocean locations.

9 They devoted the bulk of their argument to the issue of  
10 "adjacent" and what does that mean, what does that not mean,  
11 how does that affect the Quinault and Quileute fishing rights  
12 within the three-mile limit.

13 We have agreed, the parties agreed, that we were going to  
14 stay briefing on the "adjacent" issue until the court rules  
15 on this current motion. That is the real issue in this case,  
16 is whether -- the language "adjacent to," what does that mean  
17 with respect to Judge Boldt's findings?

18 We believe that Judge Boldt's findings with respect to  
19 "adjacent" include all the ocean area within three miles that  
20 is adjacent to the Quinault Indian Nation territory. Those  
21 are the words that Judge Boldt used in his finding. How can  
22 it mean anything other than that?

23 I don't know what the Makah is trying to argue, that there  
24 is a specific point in the ocean within three miles that  
25 Quinault fished, but maybe, you know, three or four or

1 ten yards up they didn't fish; or I don't know if they are  
2 arguing that Judge Boldt didn't determine that they fished  
3 within that entire three-mile area.

4 But I think that, based on the evidence that was submitted  
5 to Judge Boldt, based on what the case was about at the time,  
6 I believe that the "adjacent to" language with respect to  
7 Judge Boldt's finding means exactly what it says, that the  
8 Quinault Indian Nation fished adjacent to its territory, its  
9 territory being its land-based fishing areas. And we know  
10 what those land-based fishing areas are, because Judge Boldt  
11 identified them in his finding.

12 THE COURT: You do agree that Judge Boldt's findings  
13 did not include waters more than three miles offshore?

14 MR. NIELSEN: I do, Your Honor. And that's the crux  
15 of the issue, I believe. I think what Makah is trying to do  
16 here is ask this court -- well, they've just admitted they  
17 were trying to ask this court to retain jurisdiction so it  
18 could determine the Quileute and Quinault ocean fishing  
19 places beyond the three-mile limit. I think that is really  
20 the crux of the issue, Your Honor. That is what this is all  
21 about.

22 But there are a number of legal, equitable, and practical  
23 reasons why that request should be rejected.

24 THE COURT: Tell me why you don't believe the court  
25 has jurisdiction, as you argue in your material.

1 MR. NIELSEN: Well, we've argued that the court  
2 doesn't have -- well, there's a couple reasons, Your Honor.  
3 First, you know, Makah is claiming that, well, gee, you know,  
4 Quileute and Quinault are outliers because they have never  
5 had their ocean fishing rights outside of three miles  
6 adjudicated.

7 But what they failed to tell the court is that that right  
8 has already been acknowledged by the federal government. And  
9 the federal government is the treaty partner to both Quinault  
10 and Quileute. The federal government and Quinault and  
11 Quileute have entered into an agreement. They have  
12 negotiated an agreement based on evidence that was submitted  
13 to the government that Quinault and Quileute have fished in  
14 that area which is now determined by an unambiguous line that  
15 is set by the federal government in their regulations.

16 Why are Quinault and Quileute outliers? They are not.  
17 They have not been fishing illegally. They have never fished  
18 illegally. They have been fishing pursuant to an  
19 interpretation that they have reached with respect to their  
20 treaty rights, with their treaty partner, in waters that are  
21 under the exclusive jurisdiction of their treaty partners.

22 THE COURT: So as long as a dispute arises under the  
23 treaty rights, doesn't this court then have jurisdiction to  
24 deal with it?

25 MR. NIELSEN: Well, it depends on what the dispute

1 is, Your Honor. But if the dispute is that Quinault and  
2 Quileute are fishing somehow outside of the right to fish  
3 their treaty right in the ocean, and that includes waters  
4 that are under the exclusive jurisdiction of the federal  
5 government, which was not a part of this case, as the court  
6 is well aware -- I mean, this whole case was about fishing  
7 within the territorial waters of the state of Washington.

8 When Quinault and Quileute intervened in this case, that  
9 is the question that was asked. That is the reason they  
10 intervened in this case, to determine their rights vis-a-vis  
11 the state of Washington, vis-a-vis the territory and the  
12 jurisdiction of the state of Washington.

13 They have not intervened in this case to determine their  
14 treaty fishing rights beyond those territorial waters. And,  
15 in fact, Your Honor, at the time, really, it was unclear who  
16 had jurisdiction over those waters.

17 And when you look at the history of this case, when you  
18 look at the history of the federal regulations, they started  
19 out when, after Judge Boldt had issued his decision, the  
20 federal government went and assumed jurisdiction 200 miles  
21 out.

22 The first regulations -- and they were the salmon  
23 regulations -- they identified a north and south boundary for  
24 all the coastal tribes, including the Makah Tribe, with no  
25 limitation on a western boundary. There was no limitation on

1     how far out the coastal tribes could go and fish.

2           When Makah then comes, in the late '70s, and asks this  
3     court to determine its treaty rights outside the case area,  
4     in that area that we're now discussing, the court did so.  
5     Nobody objected. Nobody raised any issues of sovereign  
6     immunity. Why would they? The Makah itself was making that  
7     request. So the court didn't have that in front of it. It  
8     wasn't faced with that issue. It went ahead and adjudicated  
9     those rights.

10           Well, Quileute and Quinault took a different route. We  
11     decided to negotiate with the federal government, our treaty  
12     partner, the entity that had jurisdiction within that area.  
13     And based on that negotiation, we determined -- we and our  
14     treaty partners determined what was a reasonable limit to the  
15     Quinault and Quileute fishing rights out into that area, into  
16     that ocean, beyond the three miles that were already  
17     adjudicated by Judge Boldt, out to the 200 miles in which the  
18     federal government had asserted jurisdiction.

19           Why does that make us any more of an outlier than anybody  
20     else? Why does that even make us an outlier? It wasn't as  
21     if Quinault and Quileute were deciding on their own, we're  
22     just going to go out there and fish wherever we want to fish  
23     because there was no adjudication over our rights out in the  
24     ocean.

25           Quinault and Quileute did it one way. Their way is no

1 more or no less valid than the way the Makah did it. The  
2 Makah asked for an adjudication. But there is absolutely no  
3 legal theory that I am aware of, Your Honor, that says that a  
4 tribe has to have a court's blessing to fish in an area under  
5 the exclusive jurisdiction of its treaty partner. And, in  
6 fact, I think that the cases suggest otherwise. We know that  
7 treaties are self-executing. We know that treaties are  
8 obligatory on the parties to the treaties. So it makes sense  
9 that Quinault and Quileute would take the route that it took.

10 Now --

11 THE COURT: All right. Let me -- this is a fairly  
12 important part of this. Let me ask you directly. Are you  
13 asserting a treaty right to fish in the area from three to  
14 200 miles?

15 MR. NIELSEN: No, Your Honor.

16 THE COURT: You are not?

17 MR. NIELSEN: No, we're not.

18 THE COURT: What gives you the right to fish there  
19 then?

20 MR. NIELSEN: We're asserting the treaty right to  
21 fish between the areas of three miles out to where we and the  
22 federal government have determined is the limit or the extent  
23 or the boundary of our treaty fishing right, which is now  
24 somewhere approximately 40 to 50 miles off the coast.

25 There is an unambiguous line, Your Honor, that has been

1 drawn. And it's contained in the framework. It's contained  
2 in the regulations regarding all the fisheries under the  
3 jurisdiction of the United States. And that line is drawn  
4 right straight down the ocean.

5 And prior to that, prior to that determination, prior to  
6 the regulations being implemented, as I said before, there  
7 was no limit on how far, or nobody imposed any limit on how  
8 far Quileute and Quinault or even Makah could fish out in the  
9 ocean beyond three miles.

10 Now there is. There is a fine, unambiguous line. We are  
11 not asserting that we can fish beyond that line. We are  
12 asserting that we can fish up to that line, because that is  
13 the line that was acknowledged by us and by our treaty  
14 partner, the United States, as the area in which we have a  
15 right to exercise our treaty right to fish.

16 And, again, Your Honor, I don't understand how that makes  
17 us outliers. We are fishing in that area legally. We are  
18 fishing in that area legally pursuant to federal regulations.  
19 There is no illegal fishing going on here. And to suggest  
20 there is is just plain ludicrous.

21 As I stated before, there is no law that I am aware of  
22 that requires a tribe that is fishing in the exclusive  
23 jurisdiction of its treaty partner, pursuant to an  
24 interpretation of that treaty between it and its treaty  
25 partner, that it has to come into some court, whether it's

1 this court or some other court, and get the court's blessing  
2 to do so. That just simply isn't the law, Your Honor. As  
3 much as Makah would like to think it is, as much as Makah  
4 would like to make that the law, that's not the law.

5 So the question then becomes, if this court does take  
6 Makah's invitation and decides, yes, I have jurisdiction, I'm  
7 going to determine -- or we are going to have a trial and  
8 determine exactly how far out beyond the three-mile limit  
9 Quinault and Quileute have a treaty right to fish, then what  
10 we are going to end up doing, Your Honor, is we are doing  
11 something that has never been done in this proceeding before.  
12 We are allowing another tribe, in this case Makah, to use  
13 Paragraph 25(a)(6) as an offensive procedural weapon. I  
14 don't think that was the intent behind that. I don't think  
15 that was the intent that Judge Boldt had when he adopted that  
16 provision of his decree or his order.

17 It appears that the intent behind (a)(6) was to allow a  
18 tribe to come in and argue that their treaty rights were  
19 broader than were first determined under Final Decision 1. I  
20 don't think it was intended to allow a tribe -- or a  
21 plaintiff tribe to come in and then use it offensively  
22 against another plaintiff tribe to say, oh, no, you don't get  
23 the right to fish there.

24 I mean, if that was the intent, and this court ruled that,  
25 yes, that is the intent and, yes, we can go forward with

1 something like that, then it seems to me that that would open  
2 up an opportunity for every other tribe in this proceeding to  
3 file a preemptive RFD whether or not the other tribe they are  
4 filing against has ever fished in an area, has ever claimed  
5 it's going to fish in an area, has ever been intending to  
6 fish in that area, just to ensure that that never happens.

7 And it doesn't seem that it would require that tribe who  
8 is filing that to say, oh, gee, we're harmed by you fishing  
9 in this area, because, as I've said, if it can be used  
10 offensively, then they don't have to show any harm. They  
11 wouldn't have to show anything other than, for example,  
12 Quinault saying to the Muckleshoot, we're going to file this  
13 RFD because we don't believe there is any evidence that  
14 there's Muckleshoot fish in the Strait of Juan de Fuca.

15 Well, the Muckleshoot may be in the process -- they may  
16 have some evidence. They may be in the process of gathering  
17 some evidence that they did, intending at some point in time  
18 to bring an (a)(6) motion to this court to adjudicate their  
19 right to fish there.

20 But if a tribe like Quinault can come in and preempt them  
21 from doing that, then what is to prevent any other tribe from  
22 doing that with respect to any other tribe? I can't believe  
23 that that is what Judge Boldt intended. I can't believe that  
24 that is the intention behind Paragraph 25(a)(6). And there  
25 is nothing to suggest that it is either.

1 THE COURT: Let me ask you this. Your clients have  
2 been able to agree on a management plan with the Makah  
3 involving, I think, cod, halibut, and salmon. Why have you  
4 not been able to come to an agreement on whiting?

5 MR. NIELSEN: Your Honor --

6 THE COURT: Do you really want to leave it to this  
7 court to make those kinds of determinations?

8 MR. NIELSEN: Your Honor, my preference would be to  
9 not leave it to this court to make any of those kind of  
10 determinations. You know, when I first started practicing  
11 law, I was told by a judge that you never want to go to  
12 court, you never want to have somebody else make that  
13 decision, that the parties should always try to settle  
14 whatever disputes they have.

15 And, no, I don't think that we want the court to make that  
16 decision. We do not want the court to make that decision.  
17 But the problem, and why we haven't been able to reach an  
18 agreement, is that Makah's position is that -- and it's the  
19 position it's taken with NMFS, it's the position it's taken  
20 with the federal government, that we are entitled to a  
21 certain allocation of the whiting. And they have not moved  
22 off of that position.

23 Their position is that, whatever allocation is set aside  
24 for the tribe's treaty rights in this whiting fishery, we are  
25 entitled to this specific percentage. And the Quinault and

1 Quileute position has always been, we are willing to work  
2 with the Makah, we are willing to work with the federal  
3 government to set an allocation, but we are not willing to do  
4 so on terms that were submitted to us by Makah without any  
5 movement. That is not the way it's supposed to work.

6 THE COURT: Well, the federal government does not get  
7 into the business of allocating. They give you the split,  
8 the tribes, and then it's up to you to decide.

9 MR. NIELSEN: And that's what Makah -- that's Makah's  
10 problem. And that is why we have a breach of the settlement  
11 in this area, Your Honor, because Makah wants the federal  
12 government to do just that, to set allocations for each one  
13 of the tribes.

14 And we have balked at that. We have taken the position,  
15 as Your Honor has just described, that when the federal  
16 government sets the treaty allocation, it sets an allocation  
17 for the entire treaty tribes, and that it is up to the treaty  
18 tribes to work out amongst themselves how they are going to  
19 allocate that percentage.

20 And we have been more than willing to do that with the  
21 Makah. It's Makah that has been unwilling to do that with  
22 us. And that's why we find ourselves here today. Now,  
23 Makah, I'm sure -- this is a no-win proposition for Makah,  
24 because if they can convince this court that it should wade  
25 into these uncharted waters and adjudicate the Quinault and

1 Quileute fishing rights outside of three miles -- oh, and by  
2 the way, I don't even know how that would work.

3 When a tribe comes in under an (a)(6) to adjudicate its  
4 own treaty fishing rights, or an expansion of its own treaty  
5 fishing rights, it's pretty clear. We know what the burdens  
6 of proof are. We know what the sufficiency of the evidence  
7 test is. We know how. We have a template for doing that.  
8 There is no template for doing what Makah is asking this  
9 court to do. Who has the burden of proof? What is the  
10 burden of proof? What is the sufficiency of the evidence?

11 And then, even if you address those issues, how do you  
12 address the issue that we have an acknowledgement by the  
13 federal government that we do have a treaty right to fish out  
14 to that line that I have just described? How do we deal with  
15 that? Do we use what Judge Rothstein had indicated was  
16 appropriate, whether there is extraordinary evidence that the  
17 Quinault and Quileute didn't really fish to that line? Do we  
18 talk about whether or not the Secretary of Commerce's  
19 decision or determination that Quinault and Quileute fished  
20 out of line was arbitrary and capricious? Is that the  
21 standard that we use, or do we use some other standard, some  
22 other standard that I don't even know we have even identified  
23 or addressed?

24 There is a host of procedural issues and a host of  
25 procedural problems with Makah's request, which is why I

1 don't believe that that is what Paragraph 25(a)(6) was  
2 intended for. It wasn't intended as an offensive weapon to  
3 be used by one tribe against another, which is exactly what  
4 Makah is trying to use it for.

5 THE COURT: You only have a couple of minutes,  
6 counsel. I agree with you, first of all, that it opens up a  
7 host of procedural issues that no one has ever considered  
8 before. And it opens up a lot of possibility for attorney  
9 billing hours as well, rather than putting the resources into  
10 what they should be doing.

11 MR. NIELSEN: Yes.

12 THE COURT: Exactly. But, anyway, two minutes.

13 MR. NIELSEN: Thank you, Your Honor. I just want to  
14 make two -- well, three quick points, that this is all about  
15 the whiting fishery. We all know that. I mean, Makah admits  
16 it in the pleadings, that the reason it didn't join in whole  
17 in this action is because they expressed no interest in the  
18 whiting.

19 So it's really not about Quinault and Quileute harvesting  
20 halibut, harvesting salmon, harvesting blackcod, or any of  
21 the other things that they are claiming. We know exactly  
22 what this is about.

23 The Ninth Circuit has questioned whether it is proper for  
24 this court to displace the federal government in management  
25 of its fisheries. And that is what Makah is really

1 requesting this court to do.

2 It has also twice stated that we can think of no more  
3 complex case than this. Well, Makah invites the court to add  
4 what we believe is another needless layer of complexity to  
5 this case.

6 We would ask that the court deny the motion for summary  
7 judgment and that it proceed to determine Quinault's and  
8 Quileute's ocean fishing boundary outside the three-mile  
9 limit.

10 THE COURT: You know what troubles me the most about  
11 this right now in the Makah's request, as you indicated, and  
12 this host of unknowns that can happen, is thinking about some  
13 fellow federal judge 30 years from now trying to figure out  
14 what the heck Judge Martinez meant by this.

15 Thank you, Mr. Nielsen.

16 MR. NIELSEN: Thank you.

17 THE COURT: Ms. King.

18 MS. KING: May it please the court. Lauren King for  
19 the Quileute Tribe. As Mr. Nielsen mentioned, I will be  
20 discussing two topics today: Makah's standing, and a brief  
21 commentary on the issues that have been raised on Quileute's  
22 northern boundary.

23 As we put in the response, we don't think that this motion  
24 gives the court anything to determine. We ask the court to  
25 deny or strike the motion for three main reasons. First, we

1 view it as an improper and untimely motion for  
2 reconsideration. Second, it asks for relief outside the  
3 scope of this subproceeding as defined by the court. And,  
4 third, Makah fails to show standing. There simply is no harm  
5 here. And what Makah claims is harm won't be redressed by  
6 the relief they seek here.

7 So why is this really a motion for reconsideration? Well,  
8 this court has ordered twice now that this subproceeding  
9 proceed as an interpretation of what Judge Boldt meant when  
10 using the word "adjacent" in 1974.

11 And the most recent ruling on that was in March of 2012.  
12 But six months later, six months too late, Makah moves on  
13 these two issues here, which are (a)(6) issues, standing to  
14 seek an adjudication. And this court says, we're not doing  
15 an adjudication. Nobody is contesting there is standing  
16 under (a)(1). This is (a)(6).

17 And, number two, in Final Decision 1, the court's finding  
18 did not specifically determine the location of Quileute's and  
19 Quinault's ocean fishing grounds, which, as Mr. Nielsen said,  
20 we don't think is disputed. But, as you can see here, that's  
21 a Paragraph 25(a)(6) inquiry. And as Mr. Nielsen said, the  
22 parties have agreed to stay briefing on (a)(1) until after we  
23 get a ruling on this motion.

24 So, yes, Quileute is going to have plenty to say about the  
25 meaning of "adjacent" and the evidence before Judge Boldt

1 when that time comes, when and if that time comes. But for  
2 today, this is really a motion to reconsider this court's  
3 directive that we continue under (a)(1). And it should be  
4 denied as untimely and improper.

5 Along the same lines, the court can strike the motion in  
6 its entirety because it asks for relief simply outside the  
7 scope of this subproceeding. But even if you do entertain  
8 Makah's motion, Makah fails to show any harm.

9 So why is there no harm in the fisheries that were  
10 actually added: salmon, halibut, and blackcod? Well, Makah  
11 wants to start with the proposition, as Mr. Slonim said, of,  
12 if you take one fish out of the total tribal allocation,  
13 that's injury. But that's just not true, because no one  
14 tribe, not Makah, not Quileute, is entitled to harvest the  
15 entire tribal allocation. We have to, instead, start from  
16 the beginning, in Judge Boldt's mandate that we each get  
17 50 percent of what is in our U&As.

18 So without getting too far into the science of the thing,  
19 what the regulators do is they look at the tribes' U&As. And  
20 they look at two things: the geographic areas and data  
21 regarding the fish in each of those areas. And then we come  
22 to a total tribal allocation of all the U&As of all the  
23 treaty tribes for those species.

24 And when we look at that data for the tribes in this case,  
25 in a hypothetical 100-fish allocation, the area in green

1     there for Quileute and Quinault makes up about 70 fish. It  
2     contributes 70 fish to the allocation. And the area in red  
3     for Makah contributes only about 30 fish.

4         So what is injury in this scenario? We would agree that  
5     if you contribute 70 percent of the fish to the allocation,  
6     but you take out 90 percent, that is injury. But that is not  
7     the case here. You have seen the numbers. Quileute and  
8     Quinault is contributing 70 percent in halibut and blackcod.  
9     But what is it getting? What are they getting? 30 to  
10    40 percent. Makah is the one that is getting 60 to  
11    70 percent of those fisheries, and it only contributes about  
12    30 percent when you look at those two factors, geographic  
13    area and availability of fish within that area.

14        And then with respect to the salmon troll fishery, they  
15    get almost everything. That is not injury. That is a  
16    windfall. And it brings up an important point, because if  
17    Makah gets what it's asking in this subproceeding, that green  
18    area will go away, and they will be left with 30 percent. In  
19    other words, they get more fish and more opportunity because  
20    we are in the fishery.

21        So why would Makah do that? Why would Makah shoot itself  
22    in the foot like that? Well, as Mr. Nielsen said, this is  
23    not about those fisheries. This is about the whiting  
24    fishery. If it were about salmon, we would have heard about  
25    it in 1983, when all four coastal tribes litigated the ocean

1 troll fishery.

2 And if it were about halibut, we would have heard about it  
3 in 1991, when that was litigated. And we did hear from Makah  
4 in 1991, but only to say specifically that all 12 halibut  
5 tribes made factual representations to and obtained  
6 recognition out of their treaty rights from the federal  
7 regulators.

8 Makah went on to say, this court, the U.S. v. Washington  
9 court, told all the parties in that case that if you have a  
10 problem with any one of those tribes going out and exercising  
11 their treaty rights for halibut, bring a subproceeding now or  
12 forever hold your peace. The court said, I want to get this  
13 issue resolved. As Makah points out, to date, back in 1991,  
14 no party had elected to do so.

15 In 1994, Makah, along with the other coastal tribes,  
16 encouraged the federal government, when setting the blackcod  
17 allocation for the first time, to include all of the U&As in  
18 that area, including Quileute and Quinault. This isn't about  
19 blackcod.

20 And in the late '90s and early 2000s, when whiting was  
21 litigated, Makah was even okay with our participation. They  
22 didn't join the plaintiffs in that case, who were challenging  
23 our right to enter the fishery. They had the same issue  
24 we're hearing today, that we didn't adjudicate our U&As  
25 within U.S. v. Washington.

1           Instead, they submitted a joint proposal with Quileute.  
2           And that joint proposal gave Quileute 2,500 metric tons of  
3           whiting each year. It was only when we couldn't agree to an  
4           allocation that we found ourselves here.

5           And as you just mentioned, the tribes generally don't fish  
6           pursuant to allocations. Normally we have management plans.  
7           And if we do fish pursuant to allocations, only the  
8           sovereigns themselves are the ones that can impose that.

9           Yet that is the basis for Makah's lawsuit here, that we  
10          wouldn't agree to an allocation. And the ironic thing is, as  
11          you recognized earlier, Quileute and Quinault have never even  
12          entered the whiting fishery. But Makah claims that our  
13          potential entry is a threat to them, and they have raised  
14          three reasons why.

15          First, they say, if we get into the fishery, it's going to  
16          threaten their share. Second, they say, if we don't have an  
17          allocation, there is going to be a race for fish. And,  
18          third, they claim that co-management is injury. So I'll  
19          address those one by one.

20          First, our potential entry into the fishery does not  
21          threaten Makah. Why? Because whiting is managed differently  
22          than blackcod, halibut, and salmon. It's a needs-based  
23          fishery, because the tribes are not even close to asking for  
24          the full 50-percent entitlement. In Makah's own words, in  
25          its 16-year history, it never sought to harvest the full

1 50-percent entitlement. Instead, it's only asked for  
2 17.5 percent.

3 And when Quileute expressed an interest in participating  
4 in whiting in 2009, the federal regulators added onto the  
5 allocation an additional 3 percent. The tribes simply submit  
6 what's called a statement of need, and the allocation  
7 reflects that. Makah's share is safe, because what Quileute  
8 asks for is simply an add-on.

9 Secondly, Makah claims that without an allocation we'll  
10 have a race for fish. But as I mentioned, in none of these  
11 other fisheries that we're talking about today do we have  
12 management by allocation. We don't hear complaints from  
13 Makah there regarding the competitive portion of those  
14 fisheries that we are going to have a race for fish. So  
15 there is no reason to think that suddenly, magically in the  
16 whiting fishery we'll have a race for fish.

17 Moreover, even without an allocation or a management plan,  
18 Quileute always has a duty as a co-manager to conserve for  
19 the resource. So if they come up and say, here's our needs  
20 for the year, we think we can harvest 8,000 metric tons, they  
21 will manage to 8,000.

22 And because it's a needs-based fishery, those do reflect  
23 their capacity. So when we ask for 8,000 metric tons, we are  
24 not going to have the capacity really to go over. If we do,  
25 that's an issue for the next year, when we ask for our needs

1 again.

2 In short, there simply is no harm here, no standing. In  
3 the fisheries that we actually participate in, the Makah is  
4 receiving a windfall. And in whiting, we have never even  
5 entered. And even if we did, we wouldn't affect Makah's  
6 share. Makah has not shown standing here. And at the very  
7 least, there are disputed issues of material fact that  
8 preclude summary judgment.

9 Now, turning to my single point, Quileute's northern  
10 boundary, Makah did not move on this in its motion, but it  
11 does complain that we are setting our northern boundary too  
12 far north.

13 Here is Sand Point. Quileute has been setting regulations  
14 at Sand Point ever since the Boldt decision. And it has  
15 fished within those boundaries. As Mr. Nielsen mentioned,  
16 those are the federal boundaries as of 1985. And we have  
17 stayed within those.

18 The basis for Makah's complaint is that list of villages  
19 that Mr. Slonim talked about in which the northern-most  
20 fishing village for Quileute is that bottom area there called  
21 Norwegian Memorial now.

22 And Makah says, well, if that is your northern-most  
23 fishing village, that also must be the northern-most extent  
24 that you're fishing. As we said in our response, no, common  
25 sense would tell you the fishermen probably fish both south

1 and north of their villages. And we actually have an  
2 admission from Makah that we did just that.

3 In 1977, and again in 1981, in Makah's own RFD, it  
4 submitted testimony from one of its elders, Harry McCarthy,  
5 in which Mr. McCarthy says, yes, Quileutes did fish north,  
6 they fished all the way up to Tatoosh Island, that is where  
7 they camped and they fished. And asked whether Quileutes  
8 would go north of that line, whether they would go north of  
9 Tatoosh Island, Mr. McCarthy said yes. And Makah submitted  
10 this testimony as a truthful account of treaty time fishing.  
11 We don't understand how they can be here to contradict that  
12 now.

13 Secondly, Decision 1 itself supports our boundary at Sand  
14 Point. In Finding of Fact 108, Judge Boldt found that  
15 before, during, and after treaty times, the usual and  
16 accustomed fishing places of Quileute included Lake Ozette  
17 and the adjacent saltwater areas.

18 Looking at Lake Ozette here, Sand Point falls well within  
19 that finding. If anything, our northern boundary could be  
20 much farther north than it is now. But as it is at Sand  
21 Point, it's supported by both Decision 1 and the evidence  
22 submitted by Makah.

23 Having discussed that last point, I want to go back to my  
24 first statement, that there is simply nothing for the court  
25 to consider here. The bottom line is that we had an order to

1 continue on (a)(1), and Makah disregarded that order. The  
2 time for reconsideration is long past, nor is there any  
3 reason to listen to complaints about what is really a  
4 windfall to a tribe that already dominates the ocean  
5 fisheries and to purely hypothetical sky-is-falling  
6 speculation about a fishery that we have never even entered  
7 and which is set up by its very nature to give Makah and to  
8 continue giving Makah everything that it asks for whether we  
9 are in it or not.

10 Now, a point was raised a few weeks ago, in 05-4, which is  
11 finality. And for 30 years, almost 30 years now, Quileute  
12 and Quinault have been out fishing in the ocean under  
13 unambiguous federal boundaries. And in the 25 years before  
14 Makah filed this lawsuit, we never heard an objection to our  
15 right to be out there. Instead, they signed co-management  
16 agreements with us. They fished alongside us, and they urged  
17 the federal regulators to incorporate our U&As in  
18 establishing the tribal allocations.

19 Now Makah wants to erase history. They want to undo the  
20 work that we did with our treaty partner in 1985, and they  
21 want to make us start all over again. Should equity have  
22 something to say about that? We think that it should. And  
23 we think that equity should have something to say about the  
24 fact that in those 30 years both Quileute and Quinault have  
25 been fishing legally, as Mr. Nielsen pointed out. They have

1 revived their cultures of ocean fishing, and they have  
2 invested in the fisheries. And at some point, the tribes  
3 should be allowed to do that. They should be allowed to  
4 invest in the fisheries and plan for the future, have some  
5 finality.

6 We ask the court to give us some finality today and deny  
7 or strike Makah's motion. And I would be happy to take any  
8 questions.

9 THE COURT: You talked about the lack of harm here.  
10 And I understand that argument. But there was also an  
11 argument made in your written materials about the court --  
12 regarding standing in this particular case, about the fact  
13 that the original case area, that Judge Boldt really did not  
14 go beyond the three miles offshore. I asked this question of  
15 Mr. Nielsen, and I am going to ask it also of you.

16 Isn't your client in this particular case asserting the  
17 treaty right to fish in this disputed area, three to  
18 200 miles?

19 MS. KING: Quileute is asserting a right to fish  
20 within its federal U&A, which was established in 1985, yes.

21 THE COURT: Thank you, Ms. King.

22 All right. Mr. Slonim.

23 MR. SLONIM: Just a few points, Your Honor. First of  
24 all, you directed us to proceed under Paragraph 25(a)(1).  
25 And that's what we did. We looked at the language of Judge

1 Boldt's finding. We looked at the evidence in front of Judge  
2 Boldt. And we offered our interpretation of what Judge Boldt  
3 meant. I don't really understand the argument that somehow  
4 we ignored the court's order. We did exactly what the court  
5 said.

6 Ms. King stood before you and offered you 1981 testimony  
7 from a Makah elder which wasn't about treaty time fishing, it  
8 was about fishing that occurred long after treaty time, and  
9 wants to introduce that into this proceeding. But it sheds  
10 no light on what Judge Boldt meant. That testimony wasn't in  
11 front of Judge Boldt.

12 We proceeded under 25(a)(1). And we all agreed that, in  
13 looking at Judge Boldt's findings, they don't say anything  
14 about fishing more than three miles offshore. And as you  
15 have pointed out repeatedly, we have two tribes that are  
16 claiming a right to fish and exercising a right to fish more  
17 than three miles offshore where there has been no  
18 determination.

19 So that leads to, do you continue with this case and  
20 decide whether that is lawful or not, whether they have  
21 treaty fishing rights in that area? I didn't hear  
22 Mr. Nielsen's answer to your question about whether the court  
23 has subject matter to do that or not, because I think it's  
24 clear the court does have subject matter to resolve that  
25 question. It arises under the treaties, and it presents a

1 federal question. It goes to the heart of this case.

2 Now, with respect to the federal regulations and the  
3 federal line, this is really where Quileute and Quinault are  
4 engaged in a shell game. When that line -- first of all,  
5 that line is simply an extension of Makah's western boundary.  
6 The federal government didn't know where the Quileute and  
7 Quinault line was. And so the federal government just said,  
8 well, let's just take the Makah boundary and draw it south.

9 And at the time, Quileute and Quinault objected to that.  
10 They said, there's no basis for it, there's no evidence to  
11 support it, you can't do that to us. When it was challenged,  
12 when that line was challenged in connection with the whiting  
13 quotas, Quileute and Quinault said to this court, and then to  
14 the Ninth Circuit: You can't review the federal line. What  
15 you have to do is wait for the issue to come up in U.S. v.  
16 Washington. That's where U&As are decided.

17 So now that we're in U.S. v. Washington, it's like, you  
18 know, go over there. And when we go over here, they say, no,  
19 go over there. Because what this is all about is avoiding an  
20 actual adjudication of their usual and accustomed grounds, an  
21 adjudication that has been conducted for every other tribe in  
22 this case.

23 Mr. Nielsen says, well, when we got involved in this case,  
24 we were only interested in our fishing rights within three  
25 miles. And I think that the implication is that, so we never

1 waived our immunity with respect to our right outside of  
2 three miles.

3 But if you look at our response to the motion to dismiss,  
4 we detail proceeding after proceeding after proceeding in  
5 which Quileute and Quinault have come to this court seeking  
6 relief with respect to their fishing rights more than three  
7 miles offshore.

8 Quileute, for its part, in a shellfish subproceeding,  
9 asked the court to rule that it had usual and accustomed  
10 grounds 40 miles offshore. How they can now say, well, but  
11 that's outside your jurisdiction, you can't do that, is  
12 beyond me.

13 I want to talk a little bit about the issue of harm and  
14 the 70 percent/30 percent argument Ms. King made. Treaty  
15 allocations aren't based on the size of a tribe's usual and  
16 accustomed grounds. They are based on how many fish pass  
17 through those grounds.

18 The halibut resource tends to migrate from north to south.  
19 And so the same fish that are available in the Quileute and  
20 Quinault areas first come through the Makah areas. We all  
21 have an entitlement to all of those fish. There is no one  
22 tribe contributing more than another tribe.

23 As this court pointed out, in denying the Lummi's request  
24 for a stay in 11-02, if a tribe is fishing outside of its  
25 usual and accustomed grounds, that causes injury to other

1 tribes. We are fishing on a common stock of fish. We are  
2 under a single allocation. We are forced to negotiate  
3 intertribal agreements. We are forced to co-manage. And we  
4 lose fishing opportunities as fish are taken.

5 And that's all fine if everybody is playing by the same  
6 rules, if everybody is fishing within their usual and  
7 accustomed grounds. But when you have a situation where  
8 there is a question of whether a tribe is fishing within its  
9 usual and accustomed grounds or not, to just say, well,  
10 forget about that, you know, negotiate the co-management  
11 plan, and don't worry whether they are fishing lawfully or  
12 not, that's a real injury, and that's a real threat to the  
13 integrity of this lawsuit and the treaty right.

14 There is no question that this litigation was triggered by  
15 the dispute over the whiting fishery. When Quileute and  
16 Quinault announced their intent to participate in the whiting  
17 fishery, we said to them, let's work out separate  
18 allocations, because that's good for all tribes.

19 There's a lot of things that are unique about the whiting  
20 fishery. You need to find a processor to process the fish.  
21 And if you have a fixed amount of fish that you can work  
22 with, it's a lot easier to find a processor than if you don't  
23 know what you are going to catch.

24 There are enormous bycatch concerns in the whiting fishery  
25 for overfished stocks of rockfish and listed species of

1 salmon. The only way to avoid bycatch is by slowing down the  
2 fishery. When you see high levels of bycatch, you move to  
3 another area. You don't allow fishing at night. You say  
4 we're not going to open the fishing at all.

5 If you have a race for fish in that context, you either  
6 sacrifice the concern for bycatch or you lose out on the  
7 opportunity to harvest whiting. And that's different than  
8 the halibut fishery, where we can have a 24- or 48-hour  
9 opening and say, go out and get as many fish as you can,  
10 guys. We don't have those kind of bycatch concerns.

11 When we originally proposed separate allocations in the  
12 whiting fishery, we didn't try to dictate what they were. We  
13 said, let's negotiate them, and then we'll see if we can get  
14 a big enough overall allocation to accommodate it.

15 Quileute was adamant that they wouldn't do that, that they  
16 would never agree to separate allocations. Quinault was  
17 adamant that they would never agree to separate allocations.  
18 And there was no alternative. There was nothing said: Well,  
19 we can manage this fishery in another way and address your  
20 concerns. There was nothing like that.

21 Instead, what we got was: You can't do anything about  
22 this. You can't get the federal government to help you. You  
23 can't get the federal court to help you. We're going to do  
24 what we want to do. That was the response we got over and  
25 over and over again.

1 But having triggered the issue, it's clear that there is  
2 harm in the other fisheries. It's clear that Quileute's and  
3 Quinault's participation in the blackcod reduces harvest  
4 available to Makah. It's clear that their participation in  
5 the halibut fishery reduces harvest available to Makah. And  
6 those are real, concrete injuries that are sufficient for us  
7 to have standing, much as you ruled on the motions to  
8 dismiss. There is standing. This is within the court's  
9 subject matter jurisdiction.

10 Will there be some new procedural issues? Maybe. They  
11 don't seem overwhelmingly complex to me. The court has  
12 addressed usual and accustomed grounds issues on innumerable  
13 occasions, and it can do so again.

14 We think the court has jurisdiction. The court should  
15 keep the case and make a determination.

16 THE COURT: Thank you very much, counsel.

17 Thank you all for the interesting argument.

18 Ms. Rasmussen?

19 MS. RASMUSSEN: Your Honor, I know I promised I  
20 wouldn't say anything, but I heard a couple of things that  
21 made me somewhat concerned. Just very briefly. There's  
22 three things.

23 One, at the end of the presentation, I believe Quileute  
24 said that they had federal U&As. And that causes me to pause  
25 for a number of reasons, because the idea that you can

1 establish federal U&A without due process to the other tribes  
2 would be very disruptive to the rest of the tribes in the  
3 proceeding.

4 And, also, I think they might not have thought through the  
5 implication for nontreaty tribes to actually try to establish  
6 also federal U&A and therefore disrupt allocations set aside  
7 for the treaty tribes.

8 Number two, I believe this shell game type of argument was  
9 seen in the *Samish* and *Greene* line of litigation, where it's  
10 not a -- it's a similar circumstance in that the court said  
11 you can't use the federal recognition process to gain treaty  
12 rights. And that's a little bit similar to using a federal  
13 regulation process to try to come in the back door and gain  
14 treaty rights.

15 And, lastly, there's this idea that somehow entering into  
16 management plans with tribes and respecting them and trying  
17 to manage along the way, somehow means that you slept on your  
18 rights with respect to your treaty rights plan.

19 And as this court knows, in 89-2, the judge said, no, you  
20 don't have to raise it. If the tribe does not have treaty  
21 rights, you never lose your chance of making that claim  
22 because they don't have the right in the first place.

23 And so I would urge this court to not use the good faith  
24 entering into management plans against the Makah, because my  
25 clients enter into management plans all the time with tribes

1 with whom we have great differences of opinions.

2 For years we managed halibut with the Lummi, even though  
3 we had a great difference of opinion about whether they  
4 belonged there. But life needed to go on before the  
5 adjudication was done.

6 And right now we enter into management plans on shellfish  
7 with tribes and the state with whom we do not believe that  
8 they have a right to be present in the area. And we would  
9 hate for that to be used against us one day in a proceeding  
10 such as this.

11 Thank you.

12 THE COURT: Thank you, Ms. Rasmussen.

13 And as I think was mentioned in several places throughout  
14 the memos that were submitted to the court, fishery  
15 management plans is a way of life here. They are, obviously.  
16 And I sound like a broken record every time I have one of  
17 these oral arguments. And that's because I keep trying to  
18 get the same message across, and that is that we have limited  
19 resources, and you have more and more demand. And it makes  
20 so much more sense to me for you to be able to figure these  
21 things out on your own without having the court imposing what  
22 I think is the right thing to do and then years of litigation  
23 until we figure out whether or not the Ninth Circuit thinks I  
24 was right.

25 Thank you for the very interesting argument. We'll try to

1 get an order out to you fairly quickly.

2 We'll be at recess.

3 (Proceedings adjourned.)

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7 \* \* \* \* \*

8  
9 C E R T I F I C A T E

10  
11 I certify that the foregoing is a correct transcript  
12 from the record of proceedings in the above-entitled matter.

13  
14 Dated this June 10, 2013.

15  
16 /S/ KARI McGRATH

17 Kari McGrath, CCR, CRR, RMR

18 Official Court Reporter